Filed 4/4/19 P. v. Linares CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JIMMY S. LINARES, Defendant and Appellant.	B280163 (Los Angeles County Super. Ct. No. YA092800)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alan B. Honeycutt, Judge. Affirmed.

Janet Uson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Jimmy S. Linares appeals the judgment entered following a jury trial in which he was convicted of one count of first degree residential burglary (Pen. Code,[1] § 459) and one count of felony vandalism (§ 594, subd. (a)). The trial court sentenced appellant to four years in state prison on the burglary count and imposed and stayed two years on the vandalism count under section 654. This appeal followed. Subsequently, Linares filed a petition for writ of habeas corpus in case No. B286383.[2]

Appellant contends: (1) The trial court erroneously found appellant had failed to make a prima facie showing of group bias under *Batson/Wheeler*[3]; (2) The trial court's refusal to instruct on

---

[1] Undesignated statutory references are to the Penal Code.

[2] We have concurrently considered appellant's petition for writ of habeas corpus, which raises the same ineffective assistance of counsel claims advanced on appeal. One of those claims arises from matters appearing on the four corners of the appellate record, and will be addressed in the context of the appeal, rendering this claim in the petition for writ of habeas corpus moot. The other claim of ineffective assistance of counsel will require an evidentiary hearing for resolution. As to that claim, we separately issue an order to show cause returnable in the superior court.

[3] "*Batson/Wheeler*" is the shorthand for *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), which define the procedure that "guide[s] trial courts' constitutional review of peremptory strikes" (*Johnson v. California* (2005) 545 U.S. 162, 168 (*Johnson*) in determining "whether any specific prospective juror is challenged on account of bias against an identifiable group distinguished on racial, religious, ethnic, or similar grounds." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158.)

third party liability violated appellant's constitutional rights to due process; (3) The evidence was insufficient to support a finding that appellant harbored the requisite burglary intent; and (4) Appellant received ineffective assistance of counsel. We reject appellant's contentions and affirm the judgment of conviction.

FACTUAL BACKGROUND

The prosecution evidence

Luchia Garvey and Sabrina Gilmore met appellant when he helped them move into their two-bedroom apartment in June 2015. Afterward appellant and Gilmore had a beer outside on the balcony. Appellant told Gilmore his sister lived in the same complex just downstairs from Gilmore's apartment. He lived nearby in the apartment complex next door, and he frequently visited his sister. Garvey overheard appellant say he was not happy in his relationship and was looking for someone he could be happy with. Appellant and Gilmore exchanged cell phone numbers and appellant offered to take Gilmore out to check out the local bars since she was new to the neighborhood. Sometime later appellant texted Gilmore asking her how she was and what she was doing, but Gilmore did not respond.

On July 13, 2015, Gilmore left the apartment around 1:30 p.m., and Garvey left sometime between 2:00 and 3:00 p.m. Garvey returned home between 10:30 and 11:00 p.m. As she was about to unlock the front door, she heard someone snoring inside the apartment and noticed that the window next to the door was broken. Several panels of glass were shattered and the screen was bent inward leaving an opening large enough for a person to crawl through. Looking inside the apartment Garvey could see a man's leg hanging over the armrest of the sofa and the other leg stretched out in front of the sofa. Garvey also saw a blue Chase

Bank debit card on the floor in front of the sofa. Appellant's name was imprinted on the card.

Garvey called 9-1-1 to report a break-in. Deputies arrived and used Garvey's key to unlock the door. Upon entering the apartment, the deputies found appellant asleep on the couch wearing women's undergarments and lingerie. Deputy Dwayne Javier woke appellant, handcuffed him, and escorted him to a patrol vehicle. Appellant walked downstairs without difficulty, keeping his head down. He had red lipstick on his mouth, and dressed only in Gilmore's clothing, he was wearing two tank tops, a bathing suit top, a green camisole, black bikini bottoms, and a pair of pink and red underwear.

Deputy Javier, who had conducted hundreds of arrests involving people under the influence of drugs or alcohol, did not believe appellant was under the influence of a drug. However, appellant's breath smelled of alcohol, his speech was slightly slurred, and he admitted he had been drinking, all of which led Deputy Javier to conclude appellant had consumed alcohol and was intoxicated. Nevertheless, no breath or field sobriety tests were conducted because appellant was lucid and able to answer the deputy's questions.

The locking mechanism for the deadbolt on the front door was damaged, and there were scratches near the lock between the door and the door frame. Inside the apartment, several items near the broken window had been knocked over. On the floor near the sofa was a popsicle wrapper, which matched the brand of popsicles in the freezer that Garvey had recently purchased. A bowl of cereal was on the kitchen counter.

The lights were on in Gilmore's bedroom. An open tall can of beer was on the floor near Gilmore's gold high heels and men's clothing, including a pair of pants, a button-down shirt, and a

pair of shoes. A wallet containing appellant's identification was in the pants pocket, and it appeared that appellant had simply dropped his pants and stepped out of them.

The dresser drawers in Gilmore's room were open and clothing was strewn about the floor. Makeup on top of the dresser was out of place and appeared to have been used. One red lipstick was smashed and ruined. There were red lipstick stains left by a person's lips in the crotch area of several articles of underwear, shorts, and inside the cups of two bras. The lipstick appellant was wearing was the same shade as the lipstick stains on Gilmore's clothing. A pair of pantyhose appeared to have been stretched and worn. Clothing that Gilmore had just washed was disheveled and wet, and several articles of clothing that had been removed from the laundry hamper were wet and smelled of urine. The sheets on Gilmore's bed were in disarray and moist. In the bathroom there was urine in the toilet which had not been flushed.

The lights were also on in Garvey's bedroom. The closet door was open, but Garvey's clothes had not been disturbed. The sheets on Garvey's bed were wet.

The defense expert testimony

Dr. John Stalberg, a forensic psychologist, testified for the defense on the limited subject of appellant's "proclivity for fetishes," "sexual deviance, transgender, transvestite behavior." Based on an interview with appellant that lasted "at least two hours" and his review of the police reports, photographs, and the preliminary hearing testimony, Dr. Stalberg testified that he "found no evidence of anything bizarre or strange from a sexual point of view, any perversions." Although Dr. Stalberg took into account appellant's "severe drinking problem" and the fact that appellant "was very, very intoxicated when this whole affair

occurred" in his evaluation, the trial court ruled that Dr. Stahlberg could not testify about appellant's drinking problem. In addition, Dr. Stalberg stated that he knew appellant had been accused and exonerated of rape in 1994, but he was unaware of any arrest for a violation of Penal Code section 288, child molesting.

Appellant's testimony

Appellant testified that in 1994, he was accused of a rape but was not prosecuted after it was discovered the alleged victim was lying. He was never charged or accused of a "288."

On July 13, 2015, appellant left his apartment between 2:00 and 3:00 p.m. and walked to McGeady's bar, where he drank beer he had just bought in the parking lot. In the bar appellant drank "the regular . . . two or three pitchers" of beer, and started walking home around 6:00 or 6:30 p.m. Feeling "buzzed, kind of drunk," appellant sat on a couch outside a Big Lots store until he was told to leave. Around 8:30 p.m. appellant bought more beer.

As appellant was walking home he encountered a "white guy" and a "Chinese girl" he recognized from McGeady's bar. Appellant heard the man call the woman "Sandy," but otherwise he did not know their names. He described the woman as "chubby"— shorter and heavier than appellant—with long hair. The man was skinny with short blond hair and taller than appellant.

The man invited appellant to have some beer, and appellant walked with them. Appellant was "buzzed" and had no idea where they were going. When they reached the apartment complex where his sister lived, the couple opened the gate and led appellant upstairs to Gilmore's apartment. The man opened the front door and appellant followed him and the woman inside. Appellant did not notice the broken window.

Appellant started drinking the beer he had bought at the store. But after drinking a glass of wine the woman gave him, the next thing he knew he was being awakened by deputies. Appellant denied that he touched any of the clothing in the apartment and insisted that "somebody did this to [him]," someone "played a bad prank on [him]." The only explanation he had for how he came to be wearing Gilmore's undergarments and makeup was that this couple had framed him. Appellant surmised that after he passed out, the couple undressed him and placed his clothes in Gilmore's bedroom. They then dressed him in Gilmore's thong underwear, bikini bottom, tank tops, and lingerie top, and put red lipstick on his lips. The couple was never located.

The prosecution's rebuttal

According to Deputy Javier, when appellant was led out of the apartment, he appeared coherent and lucid and never mentioned a man and woman taking him to the apartment and drugging him. Appellant also never told the deputy he thought he had been framed.

DISCUSSION

I. *Batson/Wheeler*

Appellant contends reversal is required because the trial court failed to find a prima facie case of discrimination based on the prosecutor's exercise of peremptory challenges to exclude the only two African-Americans from the jury panel in violation of appellant's constitutional rights to equal protection and a representative jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *Batson*, *supra*, 476 U.S. 79; *Wheeler*, *supra*, 22 Cal.3d 258.) Based on our independent review of the totality of the circumstances surrounding the exercise of those peremptory challenges (*People v. Sanchez* (2016) 63 Cal.4th 411, 434–435), we

conclude that the trial court correctly ruled that appellant did not present a prima facie case of discrimination.

A. *Relevant background*

During jury selection, the prosecutor exercised seven peremptory challenges, including two consecutive challenges against two African-American women, Prospective Juror Nos. 3543 and 7995. Appellant objected under *Batson/Wheeler* after each challenge on the ground that the prospective juror was African-American, and after the second such challenge, no other African-Americans remained in the venire. Describing several race-neutral reasons that appeared on the record and justified the prosecutor's challenges against these jurors, the trial court found no prima facie case of discrimination.

1. Prospective Juror Nos. 3543 and 7995

Prospective Juror No. 3543 was an artist and a healthcare provider with two minor children. She had previously served on a jury in a criminal case and reached a verdict. Her husband, father and brother were attorneys. She stated she could be a fair and impartial juror.

Prospective Juror No. 7995 was divorced with four adult children. In her job as a care manager she was occasionally required to contact police in connection with the seniors and people with disabilities with whom she worked. She previously served on a civil jury which reached a verdict. She felt uncomfortable and found the experience "a little unpleasant." "Everything about it" made her never want to serve on a jury again. Her nephew worked in a prison facility in Washington, and a sister was a deputy sheriff. She also had siblings who were incarcerated for drug offenses in other states.

Prospective Juror No. 7995 stated she could be a fair and impartial juror and considered herself an open-minded person.

However, she volunteered that she had an issue with people drinking alcohol based on her experience dating a man who became brutal when he consumed alcohol. Nevertheless, she believed that a person who was drunk could be found not guilty of a crime with which he was charged.

2. The prosecutor's voir dire

The prosecutor asked jurors if they could reach a guilty verdict even if they had unanswered questions. Prospective Juror No. 3543 responded, "If I have unanswered questions, I couldn't come back with a verdict saying somebody is guilty." But when the prosecutor added that the unanswered questions were not material to the elements of the crime, the juror said she would be able to reach a verdict.

When the prosecutor posed the same question to Prospective Juror No. 7995, she responded that if she had questions, "it would be hard for [her] to say that someone is guilty." The prosecutor pressed, "So even if you believe that an individual committed a crime, you believe beyond a reasonable doubt this person committed a crime because each one of those elements have been met, have been proven beyond a reasonable doubt, so even if you still have unanswered questions, you think you cannot reach a verdict of guilty?" The juror answered, "I don't know about that because if there's—if it's been proven without a—without reasonable doubt, then I shouldn't have any unanswered questions. So if I have unanswered questions, in my opinion it hasn't been proven." The prosecutor responded, "What if those unanswered questions aren't material in meeting those elements of a crime, but they're still questions you may have, what are your thoughts?" The juror replied, "I don't know. If I feel like you've proven that the person is guilty, then I don't have

to answer that. But if I don't feel like it's been proven, then I can't say he's guilty."

The prosecutor used the following hypothetical set of facts to explain the concepts of circumstantial and direct evidence: A teacher walks into her class and places a giant chocolate chip cookie on her desk. As she leaves the classroom, she tells the students she will be right back and not to touch the cookie. She returns moments later to find a piece of the cookie gone. One of the students, Suzy, points at Joey, and says she saw him eat the cookie. The teacher notes crumbs on Joey's desk and on his hands and mouth. The prosecutor explained, "So the circumstantial evidence would be the cookie missing and the cookie crumbs and chocolate on Joey's face, hands, and desk. The direct evidence would be Suzy seeing and saying I saw him do it."

The prosecutor asked Prospective Juror No. 7995 for her thoughts on the cookie hypothetical. She responded, "I just have issues with that scenario because in my opinion Suzy could have given him the cookie and made sure he got in trouble with it." The prosecutor asked if the juror would take into consideration additional corroborating evidence. Prospective Juror No. 7995 answered, "I would have to."

The prosecutor then turned to Prospective Juror No. 3543 and asked for her thoughts. The juror responded, "I kind of feel sort of the same thing that Suzy could of made the little boy eat it. So it could have been that he didn't really want to do it but she made him do it so she's—" The prosecutor added, "So what if there's no evidence of that? What if Suzy testifies, every question is asked by the defense and the People and that never comes up. That's not part of [the] evidence of the case. Is that something that you would still wonder about even though it's not part of the evidence?" The juror replied, "Well, if it's not part of the

evidence, I have to go on the evidence." Prospective Juror No. 7995 responded to the prosecutor's further inquiry that she felt the same way as Prospective Juror No. 3543.

The prosecutor then addressed Prospective Juror No. 3543 again, confirming that she had been the victim of a robbery and stating, "You hesitated when the judge asked you if you could be fair in this case. I sensed some hesitation as to whether or not you believed that you could be a fair judge of the facts in this case. Is that a correct assessment?" Prospective Juror No. 3543 said, "No, because I don't think I hesitated. I think I could be fair." In response to the prosecutor's further questions, the juror stated she did not think her prior experience would affect her ability to be fair, and she could evaluate whether the prosecution had proved its case beyond a reasonable doubt without being influenced by that experience.

Finally, the prosecutor asked Prospective Juror No. 7995 about her sister who was incarcerated in Las Vegas on a weapons charge. The juror said there was nothing about that case that would affect her ability to be a fair judge of the facts in this case.

3. The trial court's ruling on the Batson/Wheeler motion

When the prosecutor exercised a peremptory challenge to excuse Prospective Juror No. 3543, the defense objected under *Batson/Wheeler*. Stating the basis for the objection, defense counsel explained, "I've got to note whenever there's a black juror who is excused we have seated on the jury panel," and this was one of only three black jurors in the venire. Defense counsel continued, "I just had to note that for the record. We would make our objection for the record and submit it." Observing there were other African-Americans in the venire, the trial court declared that no prima facie showing of discrimination had been made and overruled the objection.

When the prosecution exercised its next peremptory challenge against Prospective Juror No. 7995, defense counsel again objected under *Batson/Wheeler*, "for the record." Defense counsel explained, "I could understand to some extent why the prosecutor would kick [this juror], but she's, again, another black juror—black woman juror, and I have to make this objection." Declaring that Prospective Juror No. 7995 was the only remaining African-American juror, defense counsel stated, "So I have to make the objection under *Batson versus Kentucky* and *People versus Wheeler*, and I would submit."

Finding a race-neutral basis for the prosecutor's exercise of peremptory challenges against both Prospective Juror Nos. 3543 and 7995, the trial court explained, "Let me clarify for the record each of the jurors engaged with counsel in the hypothetical about the cookie that, in essence, they inserted into the hypothetical facts that were not, in essence, given, looking for alternative explanations to find a reason as to why [Joey], the cookie eater, wouldn't be guilty of eating the cookie. [¶] I realize and recognize this is a hypothetical. It's light-hearted to some extent. I think it does give some insight into the mind-set of the juror in consideration of the very plain simple presentation of facts and their thought process as it relates to other alternative explanations." The court further described "as slightly tense" the exchange between the prosecutor and Prospective Juror No. 3543 in which the juror denied the prosecutor's suggestion that she had hesitated in responding to a question about whether she could be a fair judge of the facts in this case.

B. *Applicable law*

"Peremptory challenges are 'designed to be used "for any reason, or no reason at all." ' " (*People v. Armstrong* (2019) 6 Cal.5th 735, 765.) But they are not without limits. " 'Both the

federal and state Constitutions prohibit any advocate's use of peremptory challenges to exclude prospective jurors based on race. [Citations.] Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution.' " (*People v. Parker* (2017) 2 Cal.5th 1184, 1210–1211 (*Parker*); *People v. Scott* (2015) 61 Cal.4th 363, 383.) "Exclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal. (*People v. Silva* (2001) 25 Cal.4th 345, 386.)" (*People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1158.) There is, however, " 'a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination.' " (*Parker*, at p. 1211; *Armstrong*, at p. 766.)

Our Supreme Court has explained that "[t]o assess whether such prohibited discrimination has occurred, our inquiry under *Batson*/*Wheeler* follows three distinct, familiar steps. First, the party objecting to the strike must establish a prima facie case by showing facts sufficient to support an inference of discriminatory purpose. (*Johnson*[*, supra,* 545 U.S. at p.] 168.) Second, if the objector succeeds in establishing a prima facie case, the burden shifts to the proponent of the strike to offer a permissible, nonbiased justification for the strike. ([*Ibid*.]) Finally, if the proponent does offer a nonbiased justification, the trial court must decide whether that justification is genuine or instead whether impermissible discrimination in fact motivated the strike. (*Ibid*.)" (*People v. Reed* (2018) 4 Cal.5th 989, 999 (*Reed*).) However, "[t]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the

strike." (*People v. Lenix* (2008) 44 Cal.4th 602, 612–613; *Parker*, *supra*, 2 Cal.5th at p. 1211.)

Our Supreme Court has explained that " ' "[w]hen a trial court denies a *Wheeler* motion without finding a prima facie case of group bias, the appellate court reviews the record of voir dire for evidence to support the trial court's ruling." ' " (*People v. Pearson* (2013) 56 Cal.4th 393, 421 (*Pearson*).) In conducting our review, we may therefore "consider nondiscriminatory reasons for the peremptory strike that 'necessarily dispel any inference of bias,' so long as those reasons are apparent from and clearly established in the record." (*Reed*, *supra*, 4 Cal.5th at p. 1000.) Finally, we approach our review of the record with " 'confidence that trial judges, experienced in supervising *voir dire,* [are] able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.' " (*People v. Harris* (2013) 57 Cal.4th 804, 838 (*Harris*), quoting *Batson, supra,* 476 U.S. at p. 97.)

C. *Analysis*

Applying the foregoing principles to the instant case, we conclude the record does not support an inference of discriminatory intent on the prosecutor's part in exercising peremptory challenges against Prospective Juror Nos. 3543 and 7995.

It was appellant's burden to " ' "make as complete a record as feasible" ' " and "produce evidence ' "sufficient to permit the trial judge to draw an inference that discrimination has occurred." ' " (*People v. Jones* (2013) 57 Cal.4th 899, 916 (*Jones*).) Here, however, it is apparent that defense counsel's objections to excusing these jurors were at best perfunctory. The sole basis for appellant's *Batson/Wheeler* motion was that the prosecutor had

excused the only African-American prospective jurors on the panel. Even assuming the truth of that assertion, a numerical showing alone "falls short of a prima facie showing [citation] because the small number of African-Americans in the jury pool makes 'drawing an inference of discrimination from this fact alone impossible.' " (*Harris*, *supra*, 57 Cal.4th at p. 835; *Parker*, *supra*, 2 Cal.5th at p. 1212 ["the bare circumstance that *all* African-American prospective jurors were struck from the pool would be insufficient in this case to support an inference that the two were challenged because of their race" because the size of the sample was too small to permit an inference of discrimination]; *People v. Lopez* (2013) 56 Cal.4th 1028, 1049 [prosecutor struck the only two African-Americans in the jury pool, " 'but "the small absolute size of this sample makes drawing the inference of discrimination from this fact alone impossible" ' "]; *Pearson*, *supra*, 56 Cal.4th at p. 422 [no prima facie case of discrimination despite prosecutor's disproportionate use to peremptory challenges to strike African-Americans from panel]; *People v. Streeter* (2012) 54 Cal.4th 205, 223 [no prima facie case where prosecutor exercised three of five peremptory challenges against African-Americans, thus using a disproportionate ratio of strikes against African-Americans who constituted only 28 percent of the prospective jurors].)

Appellant also fails to show that the prosecutor's singling out of Prospective Juror Nos. 3543 and 7995 for "intensive questioning" demonstrated group bias. While the prosecutor did question these prospective juror at some length, the record demonstrates that these jurors' responses to the prosecutor's questions and hypothetical differed sufficiently from the answers of the other prospective jurors to warrant further inquiry. We find nothing in the prosecutor's follow-up questions to support an

inference of discrimination. As the trial court observed, these prospective jurors' responses to the cookie hypothetical demonstrated a willingness to speculate outside the evidence to find alternative explanations for the charged criminal behavior. Given the anticipated defense that appellant was "pranked" or "framed" by third parties who drugged him and dressed him in Gilmore's undergarments, the prosecutor had good reason to be concerned about such speculation by the jury.

Further, whether or not the prosecutor correctly identified any hesitation by Prospective Juror No. 3543 in answering the question about her ability to be fair, the trial court's characterization of that exchange as "slightly tense" constituted a race-neutral ground for the prosecutor to exercise a peremptory challenge. Defense counsel did not challenge the trial court's assessment, and we must accept the court's factual finding in this regard.

Additional race-neutral grounds for excusing these prospective jurors appear on the record. Both women stated they would have difficulty returning a guilty verdict if there remained any unanswered questions, even if all the elements of the crime had been proved beyond a reasonable doubt. In addition, both jurors had family members who may have caused concerns for the prosecutor. Finally, in describing her prior jury service as something she never wanted to repeat, Prospective Juror No. 7995 conveyed an active aversion to serving as a juror. Indeed, defense counsel was forced to acknowledge there were legitimate reasons for the prosecutor to excuse Prospective Juror No. 7995 based on the totality of her responses to the prosecution's voir dire.

II. The Trial Court's Refusal to Instruct on Third Party Liability

Appellant contends the trial court committed reversible error in refusing a defense instruction that pinpointed the defense theory of third party culpability. In refusing the requested instruction, the trial court noted that appellant had presented evidence of third party culpability and could argue that such evidence raised a reasonable doubt of appellant's guilt. However, no authority required the court to give the requested pinpoint instruction.

"A defendant is entitled, upon request, to a nonargumentative instruction that pinpoints his or her theory of the case." (*People v. Ledesma* (2006) 39 Cal.4th 641, 720 (*Ledesma*); *People v. Hughes* (2002) 27 Cal.4th 287, 361; *People v. Earp* (1999) 20 Cal.4th 826, 886 (*Earp*) ["Upon request, a trial court must give jury instructions 'that "pinpoint[ ] the theory of the defense," ' but it can refuse instructions that highlight ' "specific evidence as such" ' "].) Generally, an instruction that the jury must find the defendant not guilty "if evidence tending to prove that a party other than defendant committed the crime raises a reasonable doubt as to defendant's guilt" is the type of instruction "that focuses upon the defendant's theory of the case and should be given upon request." (*Ledesma*, at p. 720.) " 'But a trial court need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence [citation].' " (*People v. Hartsch* (2010) 49 Cal.4th 472, 500 (*Hartsch*).)

Here, appellant proposed the following instruction: " 'Evidence has been offered that third parties are the perpetrators of the charged offense. It is not required that the defendant prove this fact beyond a reasonable doubt. In order for

him to be entitled to a verdict of acquittal, it is only required that such evidence raise reasonable doubt in your minds of the defendant's guilt.' " However, our Supreme Court has explained that similar instructions on third party culpability "add little to the standard instruction on reasonable doubt." (*Hartsch*, *supra*, 49 Cal.4th at p. 504.) Indeed, "even if such instructions properly pinpoint the theory of third party liability, their omission is not prejudicial because the reasonable doubt instructions give defendants ample opportunity to impress upon the jury that evidence of another party's liability must be considered in weighing whether the prosecution has met its burden of proof." (*Ibid*.; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1277.)

Here, the trial court instructed the jury on reasonable doubt and the prosecution's burden to prove every element of each crime beyond a reasonable doubt.[4] Defense counsel's entire closing argument to the jury was that others had committed the crimes to "prank" appellant, and the prosecution had failed to carry its burden of proving the charges beyond a reasonable doubt. But as in *Hartsch*, appellant's proposed instruction "simply restated the reasonable doubt standard in connection with the possibility that one or more others might be guilty parties. The omission of this instruction, if error, could not have affected the verdict. It is hardly a difficult concept for the jury to grasp that acquittal is required if there is reasonable doubt as to whether someone else committed the charged crimes." (*Hartsch*, *supra*, 49 Cal.4th at p. 504; see *Earp*, *supra*, 20 Cal.4th at p. 887

---

[4] The court properly instructed the jury in accordance with CALCRIM No. 220, the standard instruction on reasonable doubt.

[not reasonably probable that had pinpoint instruction on third party liability been given jury would have reached different conclusion].)

Appellant argues that the trial court's refusal to give the pinpoint instruction in combination with the prosecutor's rebuttal argument effectively "lowered the prosecution's burden of proof by shifting the burden to the defense to present 'meaningful and credible' evidence" of the third party liability defense. We disagree.

When viewed in proper context, the prosecutor's remarks do not support appellant's claim. The prosecutor specifically told the jury, "the defense has absolutely no burden of proof as it pertains to the charges. The People have the absolute burden to prove each and every one of those elements beyond a reasonable doubt." Nevertheless, as the prosecutor explained, it was incumbent upon appellant to present "meaningful and credible evidence" to support his third party defense in order to have the jury consider it. Repeating that the defense had no burden of proof, the prosecutor reminded the jury that the defendant could have but failed to call any witnesses to support the defense. The prosecutor then proceeded to identify the holes in appellant's case.

Contrary to appellant's misleading characterization of the prosecutor's statements, there is nothing about this argument which could reasonably be understood to lower the prosecution's burden of proof or improperly shift any burden to the defendant.

III. Sufficiency of the Evidence of Appellant's Burglary Intent

Appellant contends the evidence did not support the conviction for residential burglary because the evidence of his

intoxication precluded a finding that he harbored the requisite specific intent to commit a felony or theft. We disagree.

A. *Applicable law*

The crime of first degree burglary requires an unlawful entry into a structure presently being used for dwelling purposes with the specific intent to commit any felony or a theft. (§ 459; *People v. Anderson* (2009) 47 Cal.4th 92, 101; *People v. Ramirez* (2006) 39 Cal.4th 398, 463; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041.) Although intent at the time of entry is necessary to sustain a burglary conviction, direct evidence of such intent is usually absent. Therefore in most cases, the intent to commit a felony must be "inferred from the circumstances of the charged offense." (*People v. Holt* (1997) 15 Cal.4th 619, 669.)

In determining whether substantial evidence supports the jury's verdict, " ' "we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." ' " (*Jones, supra,* 57 Cal.4th at p. 960; *People v. Manibusan* (2013) 58 Cal.4th 40, 87 (*Manibusan*); *People v. Abilez* (2007) 41 Cal.4th 472, 504.) We presume the truth of every fact the jury could reasonably infer in support of the intent to commit a felony required to sustain the burglary conviction. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) And "[w]hether a person accused of burglary was sufficiently intoxicated to negate his entertaining the requisite specific intent in entering a building, structure, or a room is a question of fact for the trier of fact to resolve." (*People v. Smith* (1968) 259 Cal.App.2d 868, 870.)

" 'If the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute

our evaluation of a witness's credibility for that of the fact finder.' " (*Jones, supra,* 57 Cal.4th at p. 963.) However, " ' " 'it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt.' " ' " (*Id.* at p. 961.) " 'Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion [that] circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal.' " (*Manibusan, supra,* 58 Cal.4th at p. 87; *Jones, supra,* at p. 961; *People v. Lewis* (2001) 25 Cal.4th 610, 643–644.)

B. *Analysis*

Our review of the record in this case reveals substantial evidence to support a reasonable inference that when appellant entered the apartment he intended to commit a felony inside. A jury can reasonably infer the requisite intent for burglary from unlawful and forcible entry alone. (*People v. Stewart* (1952) 113 Cal.App.2d 687, 691.) Here, the evidence suggested appellant first attempted to jimmy the lock with his debit card, and when that did not work, he broke out the window panes and pushed in the screen to create an opening large enough to crawl through to gain access to the apartment. (See *People v. Hinson* (1969) 269 Cal.App.2d 573, 576, 578 [broken window establishing unlawful and forcible entry sufficient to justify reasonable inference of burglarious intent].)

Other aspects of this crime also support an inference that appellant entered the apartment with the intent to commit a felony. When appellant helped Gilmore and Garvey move into the apartment some weeks earlier, he had expressed interest in Gilmore and asked her out. But Gilmore did not reciprocate appellant's interest, and she did not respond to his text message. The nature of the vandalism of this apartment where appellant

knew Gilmore lived suggests more than a crime of random opportunity, and the evidence supported the prosecution theory that appellant entered this particular apartment with the intent to seek retribution. Appellant's interactions with police also demonstrated he was not so intoxicated as to be unable to form the requisite intent. Appellant was coherent and lucid when police first encountered him in the apartment. He had no difficulty walking down the stairs from the apartment to the patrol car, and he understood and responded directly to the officer's inquiry for his name and date of birth.

Given the strength of the evidence, the jury could reasonably infer that appellant entered the apartment with the intent to commit a felony inside, and appellant's conviction for burglary is supported by substantial evidence.

IV. Ineffective Assistance of Counsel Claims

Appellant contends his trial counsel rendered ineffective assistance by failing to adequately investigate and present an intoxication defense. He further contends his defense counsel was ineffective due to her failure to move in limine to exclude references to a prior arrest, and by failing to object on grounds of prosecutorial misconduct to a reference to appellant's arrest for "child molesting" during the recross-examination of the defense expert. Appellant asserts both of these claims in his petition for writ of habeas corpus, filed concurrently with his opening brief on appeal.[5]

---

[5] We denied appellant's request to consolidate the petition with the appeal and address the claim for relief in the habeas petition by separate order.

Having considered the issues raised in the habeas petition, we conclude that appellant's claim of ineffective assistance of counsel regarding the failure to investigate and present an intoxication defense at trial is best addressed in an evidentiary hearing pursuant to an order to show cause returnable to the superior court. We therefore need not address that claim on appeal. However, appellant's second claim of ineffective assistance of counsel arising from the handling of the prosecutor's reference to an alleged prior arrest for child molestation is based entirely on matters contained in the appellate record. Because we conclude the record on appeal does not support this claim of inadequate representation, we resolve the issue in the context of this appeal.

A. *Legal principles*

Appellant contends he received ineffective assistance of counsel under both the Sixth Amendment of the federal Constitution and the California Constitution, article I, section 15. " 'The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " (*In re Valdez* (2010) 49 Cal.4th 715, 729 (*Valdez*), quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*).) " 'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the

defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.' ([*Strickland*,] at p. 687.)" (*Valdez*, at p. 729.)

To establish ineffectiveness, a defendant "must show that his attorney's 'representation fell below an objective standard of reasonableness' 'under prevailing professional norms' [citations] and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome' [citation]. 'This second part of the *Strickland* test "is not solely one of outcome determination. Instead, the question is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.' " ' " (*Valdez*, *supra*, 49 Cal.4th at p. 729; *In re Hardy* (2007) 41 Cal.4th 977, 1018–1019; *Williams v. Taylor* (2000) 529 U.S. 362, 390–391.)

Appellate scrutiny of defense counsel's performance must be highly deferential. " 'It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citation.]' (*Strickland v. Washington, supra,* 466 U.S. at p. 689.)" (*Valdez*, *supra*, 49 Cal.4th at pp. 729–730.)

In any event, as *Strickland* observed, a reviewing "court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland*, *supra*, 466 U.S. at p. 697; *People v. Carrasco* (2014) 59 Cal.4th 924, 982.)

B. *Appellant does not demonstrate ineffective assistance of counsel on the basis of trial counsel's failure to move to exclude references to appellant's prior arrest and failure to object to the reference to a prior arrest for "child molesting"*

At trial Dr. Stalberg opined that appellant did not have any sexual deviancy or fetishes related to the wearing of women's clothing. The opinion was based on Dr. Stalberg's interview of appellant during which he questioned and observed him and discussed details of the incident with him. Dr. Stalberg did not conduct any psychiatric or psychological testing, but found appellant to be "a very straightforward, candid individual . . . based on [Dr. Stalberg's] experience of seeing thousands of patients." Finally, the expert admitted that the value of his opinion was dependent upon appellant's truthfulness, but he

testified that he believed appellant had been honest and was not malingering.

On recross-examination, the prosecutor questioned Dr. Stalberg about appellant's candor during the interview, asking if he had inquired about appellant's history and the facts of this case. Dr. Stalberg confirmed that he had. The prosecutor then asked if appellant told him he had been "arrested for a violation of Penal Code section 288." Dr. Stalberg responded, "288, child molesting?" The doctor stated that he knew about a prior arrest, but "[he] didn't know it was 288." Dr. Stalberg explained that appellant had discussed his prior history, but had not said anything about a prior 288. "I thought in the early '90's [appellant] was charged with but not convicted of a rape. That's maybe what you're talking about. Maybe not. I don't know." He added that in the interview, appellant had used the word "rape" to describe the arrest and charge filed against him.

During the final redirect examination, Dr. Stalberg confirmed that appellant had told him he had no prior arrests other than the one more than 20 years earlier wherein appellant was accused but exonerated of rape because the alleged victim had lied.

Appellant contends his trial counsel's failure to seek to exclude evidence of appellant's prior arrest and failure to object to the line of questioning on prosecutorial misconduct grounds and seek an admonition amounted to ineffective assistance of counsel. However, given the abundant evidence of appellant's guilt based on his entry into the apartment and conduct inside, we fail to see how a few fleeting references to appellant's prior arrest resulted in prejudice sufficient to undermine confidence in the outcome of his trial.

It bears repeating that, in seeking reversal for the ineffectiveness of counsel, the defendant must affirmatively prove prejudice. (*Strickland, supra*, 466 U.S. at p. 693; *Ledesma, supra,* 43 Cal.3d at p. 217.) Thus, even if the defendant establishes that counsel's errors were unreasonable, he must further show that the errors in fact adversely affected the defense. (*Strickland*, at p. 693.) "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, [citation], and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." (*Ibid.*)

Here, even if counsel's handling of the evidence of appellant's prior arrest qualified as deficient performance, her response to the prosecutor's line of inquiry— establishing appellant's openness in describing a 20-year-old prior arrest with Dr. Stalberg and rebutting the prosecutor's suggestion that the offense involved child molestation—effectively neutralized any possible prejudice based on defense counsel's previous omission. Indeed, defense counsel's response to the prosecutor's line of inquiry appears to have caused the prosecution's strategy to backfire by enhancing rather than diminishing appellant's credibility. This defense tactic was a far more effective rebuttal to the prosecutor's insinuation about the nature of the prior arrest than a simple admonition from the court would have been.

Finally, the jury was instructed that the attorneys' questions and argument are not evidence. Jurors are presumed to understand and follow the court's instructions. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 447.) Accordingly, we conclude that appellant has failed to demonstrate prejudice in connection with his counsel's deficient handling of

the evidence of his prior arrest and the fleeting reference to a "288."

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.